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# Administration of Estates

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# Administration of Estates

## Administration of Estates; power of appointment

Civil Code §1386.2 (new and repealed); §§1388.3, 1389.5, 1390.5 (new); §§1388.2, 1389.3, 1389.4, 1390.1 (amended).

AB 327 (McAlister); STATS. 1981, Ch 63

(Effective July 1, 1982)

Support: Estate Planning, Trust and Probate Law Section of the State Bar of California

### *Introduction*

Chapter 63 revises the law governing the exercise of a power of appointment by residuary clause or other general disposition in a donee's will,<sup>1</sup> the release of a power of appointment not presently exercisable, and the release of a power of appointment on behalf of a minor donee.<sup>2</sup> Chapter 63 also revises the law regarding ineffective appointments and the capture doctrine<sup>3</sup>, antilapse provisions,<sup>4</sup> formal requirements for and recording of a release of a power affecting real property,<sup>5</sup> and the rights of support creditors.<sup>6</sup>

### *Exercise by Residuary Clause or General Disposition in Donee's Will*

Prior to the enactment of Chapter 63, a general power of appointment exercisable at death of the donee was exercised by a residuary clause or other general language of the donee's will purporting to dispose of the property subject to the power,<sup>7</sup> unless the creating instrument required that the donee make a specific reference to the power or the creating instrument<sup>8</sup> or the donee manifested an intent not to exercise the power.<sup>9</sup> This approach, however, could have operated to upset

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1. See CAL. CIV. CODE §1386.2.

2. See *id.* §1388.3(a)-(e).

3. See *id.* §1389.3(a), (b).

4. See *id.* §§1389.4, 1389.5.

5. See *id.* §1388.2(d).

6. See *id.* §§1390.1, 1390.5.

7. See CAL. STATS. 1969, c. 155, §1, at 402 (enacting CAL. CIV. CODE §1386.2).

8. See CAL. STATS. 1969, c. 155, §1, at 402 (enacting CAL. CIV. CODE §1386.2(a)). For a decision interpreting the specific reference requirement, see *Estate of Eddy*, — Cal. App. 3d — (1981).

9. See French, *Exercise of Powers of Appointment: Should Intent to Exercise be Inferred From a General Disposition of Property?*, 1979 DUKE L.J., 747, 791. [hereinafter cited as French].

a carefully drafted estate plan by interfering with a primary purpose of creating the power: to qualify the property for the marital deduction.<sup>10</sup> For example, it is common for estate plans of married couples to include a marital deduction trust to secure the marital deduction without transferring property outright to the surviving spouse and still providing that individual with a life estate and general testamentary power of appointment over the remainder.<sup>11</sup> In so doing, the donor does not intend that the donee exercise the power, but instead intends that the clause in default of appointment control the devolution of the property.<sup>12</sup> Accordingly, those statutes that require the residuary clause or other general disposition in the donee's will to exercise a power can create severe contradictions in these estate plans.<sup>13</sup>

To rectify this situation, Chapter 63 states that a general residuary clause or general disposition of all the testator's property is *not* an exercise of a power of appointment held by the testator unless there is a specific reference made to the power or there is some other manifestation of intent to exercise the power.<sup>14</sup>

#### *Release of Power of Appointment Not Presently Exercisable*

Prior to the enactment of Chapter 63, a power of appointment not presently exercisable could not be released<sup>15</sup> if the result was the present exercise of the power.<sup>16</sup> There are, however, certain circumstances when a release is justified.<sup>17</sup> Chapter 63 permits release of a power of appointment<sup>18</sup> that is not presently exercisable except in those cases when the release fails to benefit all persons or the class designated by the donor to take in default of the donor's exercise of the power of appointment.<sup>19</sup>

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10. See French, *supra* note 9, at 791.

11. See French, *supra* note 9, at 791.

12. See French, *supra* note 9, at 791.

13. See French, *supra* note 9, at 791.

14. CAL. CIV. CODE §1386.2. See also CAL. CIV. CODE §1386.1 (manifestation of intent).

15. See CAL. CIV. CODE §1388.2 (operative use of term release).

16. See CAL. STATS. 1969, c. 468, §1, at 1031 (amending CAL. CIV. CODE §1388.2).

17. See *Recommendation Relating to Revision of the Powers of Appointment Statute*, 15 CAL. L. REVISION COMM'N REPORTS 1667-80 (1980) [hereinafter cited as *Recommendations*] (tax advantages). See generally Kasner, *Disclaimers as an Estate Planning Tool: Are the Proposed Regulations Contrary to Congressional Intent of Practitioners and Their Clients?*, CONTINUING EDUCATION OF THE BAR: ESTATE PLANNING AND CALIFORNIA PROBATE Report No. 21.

18. Compare CAL. CIV. CODE §1388.2(b) with CAL. STATS. 1969, c. 468, §1, at 1031 (amending CAL. CIV. CODE §1388.2).

19. See CAL. CIV. CODE §1388.2(b). See also CAL. STATS. 1981, c. 63, §10(b), at — (Section 1388.2 applies to any release made on or after July 1, 1982, but does not impair the validity of any release made prior to that date).

*Release of a Power of Appointment of a Minor Donee*

A donee who is a minor cannot exercise a power of appointment during minority except under circumstances provided by the creating instrument.<sup>20</sup> This prohibition, however, can result in undesirable tax consequences.<sup>21</sup> Thus, it may be desirable in certain cases to disclaim or release a minor donee's power of appointment.<sup>22</sup> Existing law permits a guardian of the estate of a minor donee to disclaim any interest of a minor on behalf of the minor,<sup>23</sup> but that right of disclaimer exists only for a limited time.<sup>24</sup> In an attempt to remedy this situation, Chapter 63 authorizes the court in which a guardianship of the estate proceeding for the minor donee is pending to either authorize or require the guardian to release in whole or in part the minor's or ward's powers as donee of a general or special power of appointment if the court determines that the ward as a prudent person could make the release if the ward had the required capacity.<sup>25</sup> The court is not authorized, however, to order an exercise of the power.<sup>26</sup> Furthermore, Chapter 63 is not to be construed as imposing a duty on the guardian to petition for the order authorizing release or liability for failure to file a petition.<sup>27</sup>

*Formal Requirements for Release of Power of Appointment Affecting Real Property; Recording*

Prior to the enactment of Ch. 63, a power of appointment affecting real property could not be terminated by the execution of a release until the release was recorded, if (1) the creating instrument was previously recorded or (2) where the creating instrument was a will and the order or decree of distribution had been recorded.<sup>28</sup> With the enactment of Chapter 63, a release of a power of appointment that affects real property or obligations secured by real property must be acknowledged and *may* be certified and recorded, in like manner as a grant of real property.<sup>29</sup> This permissive language regarding recording makes it clear that a subsequent purchaser or encumbrancer, in good faith and for valuable consideration, who first records is protected.<sup>30</sup>

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20. CAL. CIV. CODE §1384.1(b).

21. See *Recommendations*, *supra* note 17, at 1680.

22. See *Recommendations*, *supra* note 17, at 1680.

23. CAL. PROB. CODE §§190(a)(8), 190.2.

24. *Id.* §190.3. See also *Recommendations*, *supra* note 17, at 1680.

25. CAL. CIV. CODE §1388.3(b), (d). See also *id.* §1388.3(c).

26. See *id.* §1388.3. See generally *Recommendations*, *supra* note 17, at 1681.

27. See CAL. CIV. CODE §1388.3(e).

28. CAL. STATS. 1969, c. 468, §1, at 1031 (amending CAL. CIV. CODE §1388.2(d)).

29. See CAL. CIV. CODE §1388.2(d).

30. See *id.* §§1214, 1388.2(d); *Recommendations*, *supra* note 17, at 1689.

*Ineffective Appointments: Capture Doctrine*

When the donee of a discretionary power of appointment fails to make an effective appointment, the appointive property not effectively appointed passes to the persons named by the donor as the takers in default.<sup>31</sup> If there are no takers in default, the property reverts to the donor.<sup>32</sup> Two statutory exceptions to this rule<sup>33</sup> apply the Capture Doctrine<sup>34</sup> in favor of the donee or the donee's estate when the donee of a general power of appointment makes an ineffective appointment.<sup>35</sup>

Chapter 63 replaces the prior Capture Doctrine provision with a provision that an implied alternative appointment to the donee's estate which may be found if the donee of a general power of appointment has manifested an intent that the property be disposed of as property of the donee rather than through a default of appointment.<sup>36</sup> In the absence of a finding of an implied alternative intent, the property not effectively passed goes to any persons named by the donor as takers in default, or, if there are none, reverts to the donor.<sup>37</sup>

*Antilapse Provisions*

Prior to the enactment of Chapter 63, the antilapse provisions of the power of appointment statute prevented the lapse of an appointment to "kindred" of the donee who predeceased the donee but did not prevent the lapse of an appointment to someone unrelated to the donee.<sup>38</sup> A spouse of the donee, however, is not the donee's kindred within the meaning of the antilapse statute.<sup>39</sup> Thus, a testamentary appointment to the donee's spouse will lapse if the spouse dies before the donee re-

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31. CAL. CIV. CODE §1389.3(a).

32. *Id.*

33. See CAL. STATS. 1969, c. 155, §1, at 402 (enacting CAL. CIV. CODE §1389.3). Doctrine of Capture consists of two statutory exceptions mentioned in California Civil Code Section 1389.3(b), (c). See generally *Recommendations*, *supra* note 17, at 1681.

34. See CAL. CIV. CODE §1389.3(b), (c): ((1) contrary intent must be contained in the creating instrument or the instrument of appointment, (2) unless creating instrument manifests a contrary intent, property passes to the donee or his estate if the instrument of appointment manifests an intent to assume control of the appointive property for all purposes and not only for the limited purpose of giving effect to the expressed appointment).

35. See CAL. STATS. 1969, c. 155, §1, at 402 (enacting CAL. CIV. CODE §1389.3).

36. CAL. CIV. CODE §1389.3(b). See also CAL. STATS. 1981, c. 63, §10(a), at — (Section 1389.3 applies to any case where the donee dies on or after July 1, 1982).

37. CAL. CIV. CODE §1389.3(a). See note 40 *infra*.

38. See CAL. STATS. 1969, c. 155, §1, at 402 (enacting CAL. CIV. CODE §1389.4). See also French, *Application of Antilapse Statutes to Appointments Made by Will*, 53 WASH. L. REV. 405, 432 (1978).

39. As used in Section 92 of the Probate Code, the term "kindred" means a blood relative. 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Wills and Probate* §226, at 5737 (8th ed. 1974); cf. *In re Estate of Sowash*, 62 Cal. App. 512, 516, 217 P. 123, 125 (1923) (construing term "relation" in earlier antilapse statute to exclude testator's spouse); *Estate of Goulart*, 222 Cal. App. 2d. 808, 819-24, 35 Cal. Rptr. 465, 472-76 (1963) ("kindred" normally means biological relative).

sulting in the likelihood that the donee's children will receive no share of the appointive property.

Under the provisions of Chapter 63, when a testamentary<sup>40</sup> appointment is ineffective because it is made to a person who is alive at the time the creating instrument is executed but who predeceases the donee, the appointive property passes directly to the appointee's issue, if any survive the donee, per stirpes, provided those persons are permissible appointees.<sup>41</sup> This rule does not apply, however, if the donor of the donee manifests an intent that another disposition be made.<sup>42</sup> Additionally, absent a contrary provision in the creating instrument, when a permissible appointee under a special power of appointment dies before the power is exercised, the donee may appoint to the issue of the deceased appointee if the deceased appointee was alive at the execution or born after the execution of the creating instrument.<sup>43</sup>

*Persons donee obligated to support treated as creditors*

Chapter 63 adds provisions to make clear that where a creditor of the donee has a right to reach property subject to a power of appointment, this right extends to a person to whom the donee owes an obligation to support to the extent of that obligation.<sup>44</sup>

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40. See French, *Application of Antilapse Statutes to Appointments Made by Will*, 53 WASH. L. REV. 405, 407 (1978) (if an appointment lapses, the appointive property will pass under an express or implied provision in the creating instrument which is to be effective in default of appointment, by the residuary clause of the donor's will, or by intestacy from the donor).

41. CAL. CIV. CODE §1389.4(a). See also CAL. STATS. 1981, c. 63, §10(a), at — (Section 1389.4 applies to any case where the donee dies on or after July 1, 1981).

42. CAL. CIV. CODE §1389.4(b).

43. *Id.* §1389.5. See also CAL. STATS. 1981, c. 63, §10(c), at — (Section 1389.5 applies to any case where the power of appointment is exercised on or after July 1, 1981, but does not affect the validity of any exercise of a power of appointment made prior to that date).

44. See CAL. CIV. CODE §1390.5 (definition of creditor of donee). See also CAL. CIV. CODE §1390.1 (the donor of a power of appointment cannot nullify or alter the right given creditors of the donee by California Civ. Code Sections 1390.3, 1390.4, and 1390.5).

## Administration of Estates; trusts—discretionary power

Civil Code §2269 (amended).

SB 1131 (Rains); STATS. 1981, Ch 1046

Existing law presumes that a discretionary power<sup>1</sup> conferred under a trust<sup>2</sup> is not to be left to the trustee's arbitrary discretion.<sup>3</sup> Thus, the

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1. See CAL. CIV. CODE §2267 (trustee's power as agent).

2. See *id.* §§2215-2224 (trusts).

3. See *id.* §2219 (definition of trustee).

power is subject to the control of the court and must be reasonably exercised.<sup>4</sup> When a trustee's power is sole, uncontrolled, or absolute, however, Chapter 1046 requires the trustee to act in accordance with fiduciary<sup>5</sup> principles and not in bad faith.<sup>6</sup>

In addition, in an apparent response to the recent California Appellate Court decision in *Estate of Freidman*,<sup>7</sup> Chapter 1046 addresses the specific problem of the exercise of discretionary power conferred on a trustee-beneficiary.<sup>8</sup> In the *Freidman* case, the husband and wife were settlors of a trust that conferred on the husband, upon the death of the wife, the power to invade and consume the trust to the extent necessary for the trustee-beneficiary's proper support, care, maintenance, and education.<sup>9</sup> The court held that this was a general power rather than a power limited by ascertainable standards and thus the trust was taxable as the estate of Mrs. Freidman at her death as income when used by Mr. Freidman and again as the estate of Mr. Freidman upon his death.<sup>10</sup> Arguably, this holding is contrary to the intent of the parties involved who thought they were creating an inter vivos trust arrangement to avoid double estate and inheritance tax liability.<sup>11</sup>

In an apparent response to this result, Chapter 1046 establishes a requirement of reasonableness to be read into a trust instrument conferring discretionary power on a trustee-beneficiary despite the use of absolute discretion language.<sup>12</sup> Chapter 1046 specifically provides that notwithstanding the use of terms "sole," "uncontrollable," or "absolute," the beneficiary of the trust who holds a power to take or distribute income or principal<sup>13</sup> for his or her own benefit pursuant to a standard must exercise that power reasonably and in accordance with that standard.<sup>14</sup> When the standard governing the exercise of the power does not clearly indicate that broader power is intended, the holder of the power may exercise it in his or her favor only for reasons of health, education, support, or maintenance subject to court review.<sup>15</sup> Furthermore, unless specifically provided, the trustee may not use the

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4. See generally *id.* §2269.

5. See CAL. REV. & TAX. CODE §17006 (definition of fiduciary).

6. CAL. CIV. CODE §2269(c).

7. 94 Cal. App. 3d 667, 156 Cal. Rptr. 597 (1979).

8. See *id.* at 667, 156 Cal. Rptr. at 597; CAL. CIV. CODE §2269. See also CAL. CIV. CODE §2943(a) (definition of beneficiary).

9. See 94 Cal. App. 3d at 667, 156 Cal. Rptr. at 597.

10. See generally *id.* at 667, 156 Cal. Rptr. at 597.

11. *Id.* at 667, 156 Cal. Rptr. at 597.

12. See CAL. CIV. CODE §2269(a), (d).

13. See *id.* §§730-730.15 (Principal and Income Act).

14. *Id.* §2269(d).

15. *Id.*

power to discharge personal legal obligations.<sup>16</sup> Chapter 1046 applies to any trust, whether executed before or after January 1, 1982.<sup>17</sup>

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16. *Id.* §2269(b), (e). The exercise of a discretionary power is subject to review by a court of competent jurisdiction.

17. *See* CAL. STATS. 1981, c. 1046, §2, at —; *id.* §3, at — (if any provisions of Chapter 1046 are held invalid, it will not affect other provisions or applications of this Chapter).

## **Administration of Estates; public administration of decedent's estates**

Probate Code §1151 (repealed); §§1140, 1141, 1143 (amended); Welfare & Institutions Code §8006.5 (amended).

AB 292 (Thurman); STATS. 1981, Ch 137

(*Effective July 1, 1981*)

SB 599 (Sperau); STATS. 1981, Ch 607

Support: Department of Finance

Existing law authorizes public administrators of each county to take possession of estates of decedents that have no appointed administrator and must be preserved from waste or that are ordered into their possession by the superior court.<sup>1</sup> In addition, public administrators may search for the decedent's will or burial instructions,<sup>2</sup> and, upon furnishing written certification that the estate should be administered by their office, may be given access to any safe deposit boxes held in the name of the decedent.<sup>3</sup> Chapter 137 authorizes the public administrator to obtain additional financial information concerning the assets of the decedent<sup>4</sup> from any person, bank, corporation, or other financial institution.<sup>5</sup>

Existing law also specifies that if the value of the estate does not exceed \$20,000, excluding any motor vehicle owned by the decedent, the public administrator may apply to the superior court or judge of the superior court for an order to sell any personal property belonging to the decedent,<sup>6</sup> withdraw any money of the decedent on deposit with any bank, and collect any indebtedness or claim that may be owing to the decedent<sup>7</sup> to pay the burial expenses and costs of a last illness of the

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1. CAL. PROB. CODE §1140(a).

2. *See id.* §1141(a).

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.* §1143(a).

7. *See id.*



decedent, commissions to the public administrator,<sup>8</sup> or other claims presented to the public administrator within four months of the order given by the court.<sup>9</sup> Prior to the enactment of Chapter 607, if the value of an estate did not exceed \$500,<sup>10</sup> the public administrator could sell the personal property of the decedent and apply the proceeds to specified expenses<sup>11</sup> and deposit any excess with the county treasurer without a court order.<sup>12</sup> Without making changes in this procedure, Chapter 607 now permits the public administrator to so act without court order for any estate that does not exceed \$3,000.<sup>13</sup> In addition, Chapter 607 removes the requirement that the public administrator maintain a record of all pertinent information relating to the control of each estate handled.<sup>14</sup>

Finally, existing law imposes a fee for the services of the public guardian<sup>15</sup> against the estate of the ward or conservatee when the public guardian has taken charge of an estate and thereafter relinquishes control of an estate to a subsequently appointed guardian or conservator of the estate.<sup>16</sup> Chapter 607 raises the maximum permissible fee from \$100 to \$500.<sup>17</sup>

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8. *See id.*

9. *See id.*

10. *See* CAL. STATS. 1979, c. 1026, §§1, 1.5, at — (amending CAL. PROB. CODE §1143).

11. *See* text accompanying notes 8 and 9.

12. CAL. PROB. CODE §1143(b).

13. *See id.*

14. *See* CAL. STATS. 1981, c. 607, §2, at — (repealing CAL. PROB. CODE §1151).

15. *See* CAL. PROB. CODE §§1400, 1500-1601.

16. *See* CAL. WELF. & INST. CODE §8006.5.

17. *Compare id. with* CAL. STATS. 1968, c. 207, §1, at 508 (adding CAL. WELF. & INST. CODE §8006.5).

## **Administration of Estates; costs of defending an account**

Probate Code §927 (amended).

AB 27 (Moorhead); STATS. 1981, Ch 91

Support: Ventura County Bar Association

Existing law provides that unless otherwise prescribed by statute or by the rules of the Judicial Council, it is within the discretion of the court, when required by justice, to order that litigation costs be paid by any party to a probate proceeding or out of the assets of the estate.<sup>1</sup> This provision, however, has been interpreted to not include an award

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1. CAL. PROB. CODE §1232.

of attorney's fees to either party.<sup>2</sup> Chapter 91 allows for an award of fees under certain circumstances in a contest of an accounting of an estate.<sup>3</sup> If after considering the written exceptions<sup>4</sup> to an accounting,<sup>5</sup> the court determines that the exceptions were filed without reasonable cause and good faith, the court may order the party who filed the exceptions to pay the fees of the executor or administrator and his or her attorney and any costs incurred in defending the accounting.<sup>6</sup>

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2. *See In re Power's Estate*, 97 Cal. App. 2d 888, 890, 218 P.2d 1007, 1008 (1950).

3. *See* CAL. PROB. CODE §927.

4. *See id.*

5. *See id.* §921.

6. *Id.* §927 (this provision only applies to estates when an account is filed on or after January 1, 1982).

### **Administration of Estates; appointments of successor conservators, enforcement of support of conservatee from community property**

Probate Code §2110 (repealed); §§2670, 2680, 2681, 2682, 2683, 2684, 2685, 2686, 2687, 2688, 2689, 3024, 3080, 3081, 3082, 3083, 3084, 3085, 3086, 3087, 3088, 3089, 3090, 3091, 3092 (new); §§1461, 1461.5, 2700, 2750 (amended).

AB 132 (McAlister); STATS. 1981, Ch 9

In 1979, the California Legislature enacted a comprehensive revision of California law governing guardianships and conservatorships.<sup>1</sup> Chapter 9 clarifies provisions regarding the appointment of successor conservators,<sup>2</sup> the support of a conservatee from community property,<sup>3</sup> and appealable orders in conservatorship proceedings.<sup>4</sup>

Existing law allows the appointment of a successor conservator when a vacancy in the office occurs but fails to establish uniform procedural guidelines for the appointment.<sup>5</sup> Chapter 9 clarifies the procedure by imposing, with some modifications, the existing requirements applica-

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1. *See generally* CAL. PROB. CODE §§1500-1540, 1600-1700, 1800-1910; 11 PAC. L.J., REVIEW OF SELECTED 1979 CALIFORNIA LEGISLATION 272-88 (1980).

2. *See* CAL. PROB. CODE §§2680-3024.

3. *See id.* §§3080-3089.

4. *See id.* §2750(p).

5. *See id.* §2110; *Recommendation Relating to Revision of Guardianship-Conservatorship Law*, 15 CAL. L. REVISION COMM'N REPORTS 1467-68 (1980) [hereinafter cited as *Recommendations*]. *See also* Estate of Mims, 202 Cal. App. 2d 332, 340, 20 Cal. Rptr. 667, 673 (1962) (case supports view that the service of a citation upon a petition for appointment of a successor guardian is unnecessary).

ble to original appointments of notice,<sup>6</sup> limitations on who may file,<sup>7</sup> and the content of the petition<sup>8</sup> on the appointment of successor conservators.<sup>9</sup> A petition for the appointment of a successor conservator may be filed by the conservatee, the conservatee's spouse, a relative, any interested state or local entity or public officer or employee, or any other interested person.<sup>10</sup> Notice of the time and place of the hearing on the petition must be mailed at least fifteen days before the hearing to the conservatee and the conservatee's spouse and relatives named in the petition.<sup>11</sup> If the conservatee is present at the hearing,<sup>12</sup> Chapter 9 requires the court to inform the conservatee of the nature and purpose of the proceeding,<sup>13</sup> the right to object to the person proposed as successor conservator,<sup>14</sup> the right to nominate a person to be appointed as successor conservator,<sup>15</sup> and the right to be represented by legal counsel if the conservatee chooses.<sup>16</sup> Unless the petition states that the conservatee will not be present at the hearing, a successor conservator may be appointed only after an interview, investigation, and written report is made by a court investigator at least five days before the hearing.<sup>17</sup> Chapter 9 permits the conservatee, the spouse, or any relative, friend, or interested person to appear at the hearing to support or oppose the

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6. Compare CAL. PROB. CODE §§1461, 1461.5, 2683 with *id.* §1822. See generally 11 PAC. L.J., REVIEW OF SELECTED 1979 CALIFORNIA LEGISLATION 274-75 (1980).

7. Compare CAL. PROB. CODE §2681 with *id.* §1820.

8. Compare *id.* §2682 with *id.* §1821(a)-(e).

9. See *id.* §2670. See also *Recommendations*, *supra* note 5, at 1463 (the appointment of a successor conservator should be clarified by providing the same basic protections to the conservatee that are provided for an original appointment).

10. See CAL. PROB. CODE §2681. See also *id.* §2682 (contents of petition).

11. See *id.* §§2683(b)(1), 2689 (if the conservatee is an absentee, the petition must set forth the proposed conservatee's last known military rank, social security number, and whether the absentee's spouse has commenced any action for legal separation, divorce or annulment). Compare *id.* §§1460, 1461.5, 2683 with *id.* §1822. See generally 5 U.S.C. §5561(5) (1976); 37 U.S.C. §551(2) (1976) (definition of missing status). See also CAL. PROB. CODE §2700(21) (special notice may be requested for a petition for appointment of a successor conservator).

12. Compare CAL. PROB. CODE §§2682(f), 2685 with *id.* §1828 (Chapter 9 clarifies existing law concerning information disseminated to the proposed conservatee by the court and extends the rights of the proposed conservatee to choose a successor conservator).

13. *Id.* §2685(a). Compare *id.* with *id.* §1828(a)(1).

14. *Id.* §2685(b). Compare *id.* with *id.* §1828.

15. *Id.* §2685(b). Compare *id.* with *id.* §1810 (a conservatee who has sufficient capacity to form an intelligent preference may nominate a conservator in the petition or in writing either before or after the petition is filed). See also *id.* §2685(c) (the court shall consult the conservatee to determine the conservatee's opinion concerning the question of who would be appointed as successor conservator).

16. *Id.* §2685(b). Compare *id.* with *id.* §1828(a)(6) (if the conservatee is unable to retain counsel, the court will appoint counsel).

17. See *id.* §2684. Compare CAL. PROB. CODE §2684 with *id.* §1825 (the conservatee must be present at the hearing in the case of an appointment of an original conservator unless excused by medical inability to attend, the conservatee concedes to the appointment, or the conservatee resides outside of the state). See also §2686; *Recommendations*, *supra* note 5, at 1468 (if the petition states that the conservatee will be present at the hearing and the conservatee fails to appear, the court will continue the hearing and direct the court investigator to issue a report).

petition.<sup>18</sup> Existing law establishes an order of preference for the appointment of an original conservator.<sup>19</sup> Chapter 9 extends this provision to cover appointments of successor conservators.<sup>20</sup> Finally, an appeal may be taken from the making or refusal to make an order appointing a successor conservator.<sup>21</sup>

Under existing law, the competent spouse of a conservatee has exclusive management and control of community property.<sup>22</sup> Prior to the enactment of Chapter 9, however, an independent action was necessary to enforce the support obligation if the competent spouse was unwilling to support the conservatee spouse from the community property.<sup>23</sup> Chapter 9 reduces the unnecessary expense and delay involved in instituting a separate action to enforce support<sup>24</sup> by allowing a petition to be filed<sup>25</sup> in the court where the conservatorship proceeding is pending for an order requiring the spouse who has management or control of community property to apply the income, the principal, or both, of the community property to the support and maintenance of the conservatee.<sup>26</sup> Upon the filing of the petition, the court may require the spouse to be examined under oath by the court concerning the community property and other matters relevant to the petition.<sup>27</sup> The court may, after notice and a hearing, order that the spouse who has control

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18. See CAL. PROB. CODE §2687. See generally *id.* §1424 (an interested person includes but is not limited to federal, state and local agencies and their employees).

19. See CAL. PROB. CODE §1812 (the following order of preference is given: the spouse of the proposed conservatee or the person nominated by the spouse, an adult child of the proposed conservatee or person nominated by the child, a parent or person nominated by the parent, a brother or sister or person nominated by the brother or sister, or any other qualified person).

20. See *id.* §2688(a).

21. *Id.* §2750(p).

22. *Id.* §3051(b)(1); see 11 PAC. L.J., REVIEW OF SELECTED 1979 CALIFORNIA LEGISLATION 284 (1980). See also CAL. PROB. CODE §3020 (the right given to the competent spouse to manage and control the community property where a conservatorship is established does not otherwise alter the rights of the spouses in the community property or in the income or proceeds of such property).

23. See *Recommendations*, *supra* note 5, at 1469, 1470. But see CAL. PROB. CODE §§2404 (court upon petition or its own motion can order the conservator to support the conservatee from the estate when the conservator fails to do so), §§2520-2528 (provides a summary procedure where the conservatee has a claim to real or personal property, title to or possession of which is held by another). See generally *In re Marriage of Epstein*, 24 Cal. 3d 74, 592 P.2d 1165, 154 Cal. Rptr. 413 (1979) (both spouses owe to each other mutual duties of support); CAL. CIV. CODE §§242, 5100, 5132.

24. See *Recommendations*, *supra* note 5, at 1470.

25. See CAL. PROB. CODE §3080 (the conservator, conservatee, relative, or friend of the conservatee or any interested state, local, or federal agency or employee may file a petition).

26. *Id.* §3080. See also *id.* §§3084 (when a petition is filed the competent spouse having control or management of community property must serve and file a financial declaration concerning current property), 3087 (the court determines whether the property is community or separate property).

27. *Id.* §3082. Compare *id.* with *id.* §2616. See also *id.* §3081(a), (b) (notice provisions of California Probate Code Section 1460 apply; however, if the spouse who has exclusive control of the community property is not the conservator, service must be made in accordance with California Civil Procedure Code Sections 410.10-418.10).

of the community property pay from the community property the amount that the court determines is necessary to support the conservatee.<sup>28</sup> Furthermore, the court may order the spouse to make specified monthly or periodic payments to the conservator, the conservatee, or any person designated in the order.<sup>29</sup> If the court chooses to order the assignment of payments to the person designated in the order to receive the payments, the order operates as an assignment and binds any existing or future employer served with a copy of the order.<sup>30</sup> The court retains jurisdiction to modify or vacate an order with the exception of any amount that may have accrued prior to the date of the filing of the petition to modify or revoke the order.<sup>31</sup> Notice of the order must be provided to all interested parties as provided for in the filing of a petition for appointment of an original conservator.<sup>32</sup>

Finally, if the spouse who has management or control of the community property refuses to comply with a court order regarding the application of the community to the support and maintenance of the conservatee, the court may divide the community property and the quasi-community property of the spouses, *as it exists at the time of the division*, equally in the same manner as if a marriage is dissolved.<sup>33</sup> The divided property becomes the separate property of each spouse

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28. See *id.* §3083. Compare *id.* with CAL. CIV. CODE §246 (Uniform Civil Liability for Support Act). See also CAL. PROB. CODE §§3086 (any person interested in the proceeding may file for discovery proceedings or for other preparation or response to the petition); 3088(b)(1)-(6) (factors determining the amount of support); 3088(a) (the court may order the income or principal, or both, of the community property to be paid to the State Department of Developmental Services or the State Department of Mental Health if the conservatee is a patient in either agency); 3085(a) (during the pendency of the proceeding the court may issue ex parte orders restraining the spouse having management or control of the community property from disposing of any property, real or personal, except in the usual course of business or the necessities of life).

29. See CAL. PROB. CODE §3088(d) (the court may order the spouse required to make the periodic payments to give reasonable security therefor). Compare *id.* with CAL. CIV. CODE §4801(a). See also CAL. PROB. CODE §3090 (any order of the court may be enforced by the court by execution, appointment of a receiver, contempt, or by such other orders as the court deems necessary).

30. See CAL. PROB. CODE §3088(e), CONTINUING EDUCATION OF THE BAR, CALIFORNIA JUDICIAL COUNCIL FORMS Manual No. 1285.70 (1981) (the order shall be in the form for an order assigning salary or wages prescribed by the judicial council for use in family law proceedings. The assignment shall take priority over any execution or other assignment unless otherwise ordered by a court or where there has been a previous court order requiring support of a minor child). Compare CAL. PROB. CODE §3088(e) with CAL. CIV. CODE §4801(a). See also CAL. PROB. CODE §3091 (the Judicial Council may provide by rule for the practice and procedure in proceedings involving enforcement or support of the conservatee from community property).

31. CAL. PROB. CODE §3088(f) (any interested person may request that the order of modification or revocation include findings of fact and be made retroactive to the date of filing the petition to revoke or modify). Compare *id.* with CAL. CIV. CODE §§247, 4801(a). See also CAL. PROB. CODE §3088(g); *Recommendations*, *supra* note 5, at 1491 (an order to enforce payment by the spouse having control of the community property may be modified or vacated in a dissolution proceeding under the Family Law Act).

32. See CAL. PROB. CODE §3088(f).

33. *Id.* §3089. See generally *id.* §3051(c); *Recommendations*, *supra* note 5, at 1492 (the spouse having the management or control of community property may consent to all or part of the prop-

and the separate property of the conservatee is included in the conservatorship estate.<sup>34</sup> A division of the community property does not, however, necessarily eliminate the support obligation of the competent spouse.<sup>35</sup> An appeal may be taken from a court order determining whether property is community or the separate property of either spouse as in a civil action.<sup>36</sup>

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erty being administered in the conservatorship estate); 11 PAC. L.J., REVIEW OF SELECTED 1979 CALIFORNIA LEGISLATION 284 (1980).

34. See CAL. PROB. CODE §3089 (the division of the property has no effect on the nature of the property thereafter acquired). *Cf. id.* §3054 (the court may order that property not be included in the conservatorship estate if it would not be in the best interests of both spouses).

35. See *Recommendations*, *supra* note 5, at 1492.

36. See CAL. PROB. CODE §3024.

